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# CROSSING BORDERS: A TRIPS-LIKE TREATY ON QUARANTINES AND HUMAN RIGHTS

Police officers with guns cannot make people obey a quarantine. In order for this to work, it has to be collaborative. They have to trust the government.<sup>1</sup>

## INTRODUCTION

In the spring of 2009, the emergence and spread of a new influenza, H1N1, better known as the “swine flu,” raced rapidly around the globe, scaring, infecting, and killing.<sup>2</sup> China, having experienced a serious outbreak of SARS only seven years prior, responded vigilantly by using extreme measures, which arguably infringed on basic human rights.<sup>3</sup> News stories surfaced in the United States about perfectly healthy foreigners in China forced into quarantine for multiple days due to minor coughs, runny noses, slight temperatures, or even after showing no symptoms at all.<sup>4</sup> For example, during this period a school trip consisting of twenty-one students and three teachers from a Maryland private school turned into a week-long quarantine in China simply because of one feverish passenger on the group’s flight from the United States.<sup>5</sup> All of the students and teachers on the trip were free of flu symptoms.<sup>6</sup>

Public health is traditionally a national responsibility.<sup>7</sup> Governments are responsible for running their own health care systems, managing

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1. Josh Gerstein, *Obama Team Mulls New Quarantine Regulations* (Aug. 5, 2009, 4:12 AM), <http://www.politico.com/news/stories/0809/25814.html>.

2. See, e.g., Donald G. McNeil, Jr., *W.H.O. May Raise Alert Level as Swine Flu Cases Leap in Japan*, N.Y. TIMES, May 17, 2009, at A9.

3. Donald G. McNeil, Jr. & Sharon Lafraniere, *China Presses Quarantine Against Flu*, N.Y. TIMES, July 28, 2009, at D8.

4. See, e.g., Ariana Eunjung Cha, *Caught in China’s Aggressive Swine Flu Net: Quarantine Measures Keep Cases Down But Virtually Imprison Healthy Travelers*, WASH. POST, May 29, 2009, at A1. After landing in China, medical officials boarded Miguel Gomez’s plane, and with a temperature that was only .3 degrees above normal, he was deemed a public health threat and rushed by ambulance to a quarantine facility. He was found not to be ill, but spent three days quarantined in an infectious disease ward nonetheless. He did not see any uncovered faces the entire time. His meals were pushed through a small hole. Doctors in biohazard suits sampled his blood, swabbed his throat, and took his temperature every few hours. *Id.*

5. Daniel de Vise, *China Quarantines Teens, Teachers from Md.*, WASH. POST, May 28, 2009, at B3.

6. *Id.*

7. See YVES BEIGBEDER, *INTERNATIONAL PUBLIC HEALTH: PATIENTS’ RIGHTS VS. THE PROTECTION OF PATIENTS 1* (2004).

hospitals, adopting public health legislation, deciding on ethical standards of medical personnel, and approving the use and control of medicine.<sup>8</sup> However, many health problems cannot be contained within national borders, such as the spread of infectious disease.<sup>9</sup> International cooperation to help prevent the spread of infectious disease began in the mid-1800s.<sup>10</sup> Early cooperation was mainly to protect "civilized nations" from tropical diseases.<sup>11</sup> Then, in 1948, the World Health Organization ("WHO") was created in order to assist all countries in preventing and fighting epidemics.<sup>12</sup>

Today, health related agencies such as the Center for Disease Control and Prevention ("CDC") recognize that "[t]he concept of 'domestic' as distinct from 'international' health is . . . no longer germane to infectious diseases in an era in which commerce, travel, and ecological change are intertwined on a truly global scale."<sup>13</sup> Therefore, preventing the spread of disease is not simply a nation-by-nation concern. Globalization has launched international health related issues into the global political agenda.<sup>14</sup> Due to advances in modern technology, it is possible to travel across the world in a few hours. In 2008, airplanes carried almost one billion people across international borders.<sup>15</sup> Global travel contributes to the spread of infectious diseases,<sup>16</sup> thus necessitating that public health problems be addressed at the international level.

In addition, changes in political, social, and environmental factors increase the development and spread of infectious disease on a worldwide level.<sup>17</sup> For example, population growth leads to overcrowding in ci-

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1337–38 (quoting National Health Policy Forum, Emerging and Reemerging Infectious Disease: A Major Public Health Challenge, Issue Brief No. 686 (1996)).

14. Rosario M. Isasi & Thu Minh Nguyen, *The Global Governance of Infectious Diseases: The World Health Organization and the International Health Regulations*, 43 ALBERTA L. REV. 497, 499 (2005) (stating that "only a few urgent public health risks or emergencies remain solely within the purview of national or state authorities").

15. World Tourism Org. (UNWTO), *Testing Time for International Tourism*, UNWTO WORLD TOURISM BAROMETER, vol. 7, no. 2 (June 2009) at 3, available at [http://www.unwto.org/facts/eng/pdf/barometer/UNWTO\\_Barom09\\_2\\_en.pdf](http://www.unwto.org/facts/eng/pdf/barometer/UNWTO_Barom09_2_en.pdf).

16. David P. Fidler, *Mission Impossible? International Law and Infectious Diseases*, 10 TEMP. INT'L & COMP. L.J. 493, 494 (1996).

17. Allyn L. Taylor, *Controlling the Global Spread of Infectious Diseases: Toward a Reinforced Role for the International Health Regulations*, 33 Hous. L. REV. 1327, 1335 (1997).

ties.<sup>18</sup> Overcrowded and overpopulated cities create unsanitary living conditions, the type of environment in which diseases thrive.<sup>19</sup> Political instability, which may force people to relocate, is another factor that causes diseases to spread because diseases are introduced into populations with no prior exposure.<sup>20</sup>

On the international level, there is a lack of harmonization in how countries respond to the threat of infectious disease. Some of these responses, arguably, impinge on fundamental human rights. One basic human right is the right to health.<sup>21</sup> “Under this positivistic human rights framework, government possesses an obligation, within the constraints of its resources, to provide an environment conducive to the public’s health and well-being.”<sup>22</sup> However, the protection of both public health and other human rights are not always in harmony.<sup>23</sup> For example, another basic human right is the freedom of movement.<sup>24</sup> While quarantine methods restrict the freedom of movement, it may be used in the interest of public health.

According to the CDC, quarantine is defined as: “the separation and restriction of movement of persons who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious.”<sup>25</sup> It is a method used to stop infectious diseases from spreading.<sup>26</sup> While the use of quarantine may be useful in preventing the spread of disease, locking up an individual against his or her will may, in some situations, violate their freedom of movement. Therefore, there is an obvious friction between the right to health and the right to movement. In order to reduce this friction, the WHO should implement a multilateral agreement to ensure that quarantine measures may not be used until a certain level of emergency is reached.

Part II of this Note discusses how the WHO has attempted to prevent the spread of infectious disease and the WHO’s International Health Regulations (“IHR”) on quarantine. Part III focuses on basic human rights analyzed in light of the use of quarantine. Part IV discusses some

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18. *Id.* at 1335–36.

19. *Id.*

20. *Id.*

21. LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC xiv (1997).

22. *Id.*

23. *Id.*

24. *Id.* at 3.

25. *Fact Sheet on Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 3, 2005), <http://www.cdc.gov/ncidod/sars/isolationquarantine.htm> [hereinafter *Quarantine Fact Sheet*].

26. *Id.*; see also Public Health Service Act, 42 U.S.C. § 264 (2002).

of the most recent global outbreaks of disease and how certain countries have responded, specifically focusing on the responses of the United States and China to the swine flu. Next, this Note offers advice on how international states can join together to help prevent the spread of disease while keeping in mind the basic human right to movement. Parts V and VI of this Note propose an agreement for the WHO to administer that follows the basic principles of the World Trade Organization's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). The human right to health and the human right to movement may sometimes be at odds with one another, and this proposed framework would ensure that both could be accomplished with as little friction as possible.

The TRIPS agreement is a multilateral agreement that protects intellectual property rights on an international level.<sup>27</sup> The agreement sets out minimum standards of protection for each Member State, deals with the enforcement of these standards, and sets out dispute settlement procedures for when these standards are violated.<sup>28</sup> These aspects of a multilateral agreement are attractive because they help ensure that governments do not act arbitrarily, and if there is a violation of standards, there is a form of relief. It would be possible to use minimum standards to help mitigate the friction between the right to health and the right to movement by including the point at which a violation of human rights is necessary or appropriate, mandating that the government must only impose on the right to movement when certain criteria regarding the disease and the country's population are met. Criteria would include factors such as the percentage of population infected, the seriousness of the disease, or the rate at which the disease is spreading.

An enforcement and dispute settlement mechanism is also necessary in order for a multilateral agreement, such as the one proposed, to work effectively. For example, if the school group from Maryland was quarantined before certain factors or criteria were met in terms of the seriousness of the disease, then the United States could bring an action against China to a dispute settlement panel. If, on the other hand, the disease were serious enough for quarantine to be an available option, then the Chinese government would be permitted to act as they did. This would give individuals a sense of security because there would be proof that restorative measures are necessary due to the severity of the situation.

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27. Overview: *The TRIPS Agreement*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Feb. 11, 2011) [hereinafter *TRIPS Overview*].

28. *Id.*

While quarantine methods may violate the right to movement, a Member State's government would only be permitted to infringe upon this fundamental right when the situation is sufficiently severe to meet certain minimum standards.

## II. THE WHO'S ATTEMPT TO DEVELOP AN INTERNATIONAL SYSTEM TO HELP PREVENT THE SPREAD OF INFECTIOUS DISEASE

Due to the nature of contagious diseases and the way in which different countries are constantly interacting, there is a need for cooperation among countries to prevent the spread of disease.<sup>29</sup> Before efforts were made on an international level to control infectious disease, the power lay entirely within each sovereign state.<sup>30</sup> Efforts to create an international system to help prevent the spread of disease began when the WHO was created.

The WHO is a multilateral organization specializing in international health matters.<sup>31</sup> It was established in 1948 when the International Health Conference adopted its Constitution, which was then signed by sixty-one states.<sup>32</sup> The WHO "is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries and monitoring and assessing health trends."<sup>33</sup> The WHO operates as a regulatory agency over nations.<sup>34</sup> The organization has power, according to the WHO Constitution, to enact laws including "sanitary and quarantine requirements and other procedures designed to

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29. Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1550 (2006).

30. David P. Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 MINN. L. REV. 771, 795 (1997) [hereinafter Fidler, *Emerging Infectious Diseases*] (citing Sidney Edelman, *International Travel and Our National Quarantine System*, 37 TEMP. L.Q. 28, 28–30 (1963) (detailing early national responses to threat of disease)).

31. Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301, 312 (1992).

32. Kathleen J. Choi, *A Journey of a Thousand Leagues: From Quarantine to International Health Regulations and Beyond*, 29 U. PA. J. INT'L L. 989, 1004 (2008); see also *History of WHO*, WORLD HEALTH ORG., <http://www.who.int/about/history> (last visited Feb. 12, 2011).

33. *About WHO*, WORLD HEALTH ORG., <http://www.who.int/about/en/> (last visited Feb. 12, 2011).

34. Esty, *supra* note 29, at 1550.

prevent the international spread of disease.”<sup>35</sup> Article 1 of the WHO Constitution states that “attainment by all peoples of the highest possible level of health” is a main objective.<sup>36</sup> Article 2 states that the purpose is to “stimulate and advance work to eradicate epidemic, endemic, and other diseases . . . .”<sup>37</sup> Article 2 further states that the organization’s duties include proposing regulations and agreements, and making recommendations in regards to international health.<sup>38</sup> Thus, the organization has an extensive legal basis to develop international law.<sup>39</sup>

In 1969, the WHO adopted the original version of the IHR.<sup>40</sup> After the 2003 SARS outbreak, the world’s governments recognized the need for a unified and coordinated system of defense against public health threats.<sup>41</sup> The IHR of 2005, which came into force on June 15, 2007, was a landmark for the WHO because it set out a new framework to detect and respond to public health emergencies.<sup>42</sup> The IHR defines its purpose as: “to prevent, protect against, control, and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”<sup>43</sup>

The IHR of 2005 drastically changed the notification requirements of States<sup>44</sup> on health related matters.<sup>45</sup> Previously, Parties were required to

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35. Constitution of the World Health Organization art. 21(a), July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 [hereinafter WHO Constitution]; *see also* Etsy, *supra* note 29, at 1550.

36. WHO Constitution, *supra* note 35, art. 1.

37. *Id.* art. 2(g).

38. *Id.* art. 2(k).

39. Choi, *supra* note 32, at 1005.

40. *See International Health Regulations (IHR): Ten Things You Need to Do to Implement the IHR*, WORLD HEALTH ORG., <http://www.who.int/ihr/about/10things/en/index.html> (last visited Feb. 12, 2011).

41. *Id.*

42. *See* World Health Org. [WHO], *The International Health Regulations 2005: IHR Brief No. 1* (2005), available at [www.who.int/ihr](http://www.who.int/ihr) [hereinafter *IHR Brief No. 1*]. The purpose of the IHR was to enhance national and global public health security. *Id.*

43. *Global Alert and Response (GAR): Alert and Response Operations*, WORLD HEALTH ORG., <http://www.who.int/csr/alertresponse/en/> (last visited Feb. 12, 2011).

44. “States” refers to WHO Member States and Non-Member State Parties who have agreed to be bound by the provisions. *See* WHO, *The International Health Regulations (2005): IHR Brief No. 2* (2005), available at [http://www.who.int/ihr/ihr\\_brief\\_no\\_2\\_en.pdf](http://www.who.int/ihr/ihr_brief_no_2_en.pdf) [hereinafter *IHR Brief No. 2*].

All countries which are Members of the United Nations may become members of WHO by accepting its Constitution. Other countries may be admitted as members when their application has been approved by a simple majority vote of the World Health Assembly. Territories which are not responsible for the

notify the WHO of cases of yellow fever, cholera, and the plague; now, a Party is required to report to the WHO any event that may be considered a “public health emergency of international concern.”<sup>46</sup> Factors considered in making this decision include seriousness, unexpectedness or unusualness, significant risk of spreading internationally, and significant risk of international travel or trade restrictions.<sup>47</sup> The purpose of this non-disease specific notification requirement is to expand the IHR to include new risks so that public health emergencies can be detected early.<sup>48</sup> Parties are required to keep their surveillance systems<sup>49</sup> for national health at a certain functional level and are required to inform the WHO of any evidence of health risks outside their own country that may cause a disease to spread.<sup>50</sup> Under the IHR, the WHO may request information regarding activities within the country, and the country must respond in a timely manner.<sup>51</sup>

### III. THE USE OF QUARANTINE AS A METHOD TO PREVENT THE SPREAD OF DISEASE DESPITE POSSIBLE INFRINGEMENT ON THE HUMAN RIGHT TO MOVEMENT

International human rights law promotes individuals’ rights against government negligence or intrusion throughout the world.<sup>52</sup> The right to

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conduct of their international relations may be admitted as Associate Members upon application made on their behalf by the Member or other authority responsible for their international relations. Members of WHO are grouped according to regional distribution (193 Member States).

*World Health Organization Countries*, WORLD HEALTH ORG., <http://www.who.int/countries/en/> (last visited Feb. 12, 2011).

45. See *IHR Brief No. 2*, *supra* note 44.

46. *Id.*

47. Isasi & Nguyen, *supra* note 14, at 503.

48. *IHR Brief No. 2*, *supra* note 44.

49. Public health surveillance is used to control and/or prevent the spread of disease. Surveillance uses include “detecting epidemics, documenting the spread of disease, providing quantitative estimates of the magnitude of the morbidity and mortality, describing the clinical course of disease, identifying potential factors involved in disease occurrence, facilitating epidemiologic research, targeting resources for program intervention, and assessing control of prevention activities.” Stephen B. Thacker & Ruth L. Berkelman, *History of Public Health Surveillance*, in WILLIAM HALPERIN & EDWARD L. BAKER, JR., *PUBLIC HEALTH SURVEILLANCE* 7 (1992). In recent years, computer software and hardware began to make surveillance more efficient. *Id.* at 11. Large databases are more easily analyzed and allow public health professionals to organize, tabulate, and communicate data. *Id.*

50. See *IHR Brief No. 1*, *supra* note 42.

51. See *id.*

52. GOSTIN & LAZZARINI, *supra* note 21, at 43.



health is fundamental, and the 1946 Constitution of the WHO states, "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."<sup>53</sup> The preamble defines health as "a state of complete physical, mental, and social well-being not merely the absence of disease or infirmity."<sup>54</sup> The Universal Declaration of Human Rights ("UDHR"), adopted in 1948, was a first attempt at creating a standard on the international level to promote human rights.<sup>55</sup> The basic principle of the declaration is that "[a]ll human beings are born free and equal in dignity and rights."<sup>56</sup> The UDHR addresses the basic right to freedom of movement, and Article 13 claims: "Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country."<sup>57</sup> The WHO's Constitution acknowledges the basic human right to health,<sup>58</sup> and since health is a human right, States have an absolute obligation to promote and defend that right.<sup>59</sup> However, tension exists over how to enforce these rights on a national and international level.<sup>60</sup> The outbreak of infectious disease creates situations in which governments may have to limit some human rights in order to ensure the human right to health.<sup>61</sup> The WHO widely acknowledges that the exercise of fundamental rights, specifically freedom of movement, may be limited for reasons including public health and controlling the spread of infectious disease.<sup>62</sup>

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53. WHO Constitution, *supra* note 35, pmbl.

54. *Id.*

55. GOSTIN & LAZZARINI, *supra* note 21, at 3; see Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

56. UDHR art. 1.

57. GOSTIN & LAZZARINI, *supra* note 21, at 3; UDHR, *supra* note 55, art. 13. The WHO stated that any country bound by the Regulations may not refuse entry into its territory if a person fails to provide medical records stating that he or she does not carry the AIDS virus. GOSTIN & LAZZARINI, *supra* note 21, at 21. However, many countries have disregarded this regulation and prevent people from entering who either have, or who are suspected to have, the disease. *Id.* at 3.

58. "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions." WHO Constitution, *supra* note 35, pmbl.

59. GOSTIN & LAZZARINI, *supra* note 21, at 28.

60. See *id.* at 32.

61. Lauren Z. Asher, *Confronting Disease in a Global Arena*, 9 CARDOZO J. INT'L & COMP. L. 135, 157 (2001).

62. Isasi & Nguyen, *supra* note 14, at 507.

The use of quarantine is problematic because it infringes upon a person's basic fundamental right to freedom of movement.<sup>63</sup> Forced confinement under quarantine raises many human rights issues including:

- (1) discrimination against carriers of the disease; (2) the deprivation of liberty inherent in the imposition of public health measures without establishing that the person creates a significant health risk to society; (3) the failure to maintain the privacy of health information; and (4) the failure of governments to disseminate relevant public health information.<sup>64</sup>

Focusing on issue number two, it is clear that unless it is determined that a society is at risk, it is possible that the use of quarantine may lead to an unwarranted deprivation of liberty.<sup>65</sup>

Dating back to as early as the sixth century, quarantine is one of the oldest tools used to protect individual states from the spread of epidemics.<sup>66</sup> Quarantine restricts the movement of persons who have been exposed to an infectious agent and therefore may become infectious, although have not yet become ill.<sup>67</sup> In contrast, isolation is "the separation of persons known to have an infectious disease from others who are not infected, in order to reduce contact and stop the spread of illness."<sup>68</sup> However, the two are often used interchangeably. Quarantine dates back to when authorities began to quarantine ships in order to prevent infected cargo and people from spreading the disease into the country of import.<sup>69</sup> By the nineteenth century, quarantine became a universal and widespread method of preventing the spread of disease, and Europe, Asia, and America all used quarantine in their seaports to prevent the importation of disease through trading.<sup>70</sup> However, quarantine is infamous for poor treatment and cruelty, as travelers "faced involuntary isolation based on arbi-

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63. See GOSTIN & LAZZARINI, *supra* note 21, at 3; see also UDHR, *supra* note 55, art. 13.

64. Asher, *supra* note 61, at 158–59 (citing David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079, 1122 (1998)).

65. See Asher, *supra* note 61, at 158.

66. OLEG P. SCHEPIN & WALDERMAR V. YERMAKOV, INTERNATIONAL QUARANTINE 11 (1991); see also Nola M. Reis, *Infectious Disease: Quarantine and the Law: The 2003 SARS experience in Canada (A New Disease Calls on Old Public Health Tools)*, 43 ALBERTA L. REV. 529, 532 (2005).

67. LANCE GABLE ET AL., LEGAL ASPECTS OF HIV/AIDS: A GUIDE FOR POLICY AND LAW REFORM 23 (2007).

68. *Id.*

69. Reis, *supra* note 66, at 532.

70. SCHEPIN & YERMAKOV, *supra* note 66, at 24–25.

trary regulations and irrational fears in often unhealthy, degrading conditions, sometimes reinforced by the threat of execution.”<sup>71</sup>

Article 3 of the 2005 IHR states: “[t]he implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.”<sup>72</sup> Conforming with basic humans rights is therefore implicit within the execution of the entire IHR. Article 31 of the 2005 IHR deals with health measures relating to entry of travelers and states:

If there is evidence of an imminent public health risk, the State Party may, in accordance with its national law and to the extent necessary to control such a risk, compel the traveler to undergo or advise the traveler, pursuant to paragraph 3 of Article 23, to undergo: (a) the least invasive and intrusive medical examination that would achieve the public health objective; (b) vaccination or other prophylaxis; or (c) additional established health measures that prevent or control the spread of disease, including isolation, quarantine or placing the traveler under public health observation.<sup>73</sup>

Therefore, under Article 31, a Member State may not arbitrarily force a traveler into quarantine. Only if there is an imminent public health risk may a Member State compel a traveler to be quarantined. However, this provision is not as helpful and beneficial as it may seem because a country can simply classify a situation as an “imminent public health risk” whenever it feels the need to do so.

Article 32 of the 2005 IHR pertains to the treatment of travelers. It states:

In implementing health measures under these Regulations, States Parties shall treat travelers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures, including by: (a) treating all travelers with courtesy and respect; (b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travelers; and (c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for

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71. Reis, *supra* note 66, at 532; see also DAVID P. FIDLER, INTERNATIONAL LAW AND PUBLIC HEALTH: MATERIALS ON AND ANALYSIS OF GLOBAL HEALTH JURISPRUDENCE 289 (2000).

72. WHO, *International Health Regulations 2005*, art. 3(1) (2d ed., 2005) [hereinafter WHO, *IHR 2005*], available at [http://whqlibdoc.who.int/publications/2008/9789241580410\\_eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241580410_eng.pdf).

73. *Id.* art. 31(2).

travelers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.<sup>74</sup>

While Article 32 is helpful in that it describes how travelers must be treated when compelling a traveler to undergo quarantine, it still does not address exactly when quarantine measures may be used. There must be an “imminent public health risk,”<sup>75</sup> but there is no definitive explanation as to what that entails.

Historically, the WHO has been less than aggressive in using its powers, failing to use its authority to the full extent.<sup>76</sup> Generally, the WHO issues nonbinding recommendations rather than instituting regulations.<sup>77</sup> The regulations that were promulgated by in the IHR do not have much influence because of the WHO’s “contracting out” provision that allows states to opt out of legal obligations, if so desired.<sup>78</sup> Therefore, Member States can easily escape liability if they are unwilling to follow certain regulations.<sup>79</sup>

The government of the People’s Republic of China decided that the IHR would apply to the entire territory and did not utilize the “contract out” provision.<sup>80</sup> In order to apply the IHR, the government had to revise the *Frontier Health and Quarantine Law of the People’s Republic of China*.<sup>81</sup> The revision helped develop the capacity for rapid response to a public health emergency; it created the technology for the required surveillance, reporting and notification of public health emergencies, and formulated an information-sharing device in order to implement the IHR.<sup>82</sup>

The United States accepted the IHR as well, but with some reservations.<sup>83</sup> It implemented the IHR in accordance with the United States Constitution, “to the extent that the implementation of these obligations comes under the legal jurisdiction of the Federal Government.”<sup>84</sup> The

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74. *Id.* art. 32.

75. *Id.* art. 31.

76. Rebecca B. Chen, *Closing the Gaps in the U.S. and International Quarantine Systems: Legal Implications of the 2007 Tuberculosis Scare*, 31 Hous. J. Int’l L. 83, 97 (2008).

77. *Id.* at 98.

78. *Id.* at 98–99 (stating that “[t]his ‘contracting out’ provision was intended as a solution to the earlier problem of states’ inconsistent subscriptions to various laws under the treaty system”).

79. *Id.* at 99.

80. WHO, *IHR 2005*, *supra* note 72, app. 2.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

government "reserves the right to assume obligations under these Regulations in a manner consistent with its fundamental principles of federalism."<sup>85</sup>

Since both China and the United States have accepted these regulations, both countries seem to respect dignity, freedom, and human rights.<sup>86</sup> However, the regulations do not address the control of the spread of disease,<sup>87</sup> nor do they provide the power to enforce compliance.<sup>88</sup> Disease continues to spread, regardless of state's respect for human rights.

#### IV. EMERGING INFECTIOUS DISEASES

Emerging infectious diseases ("EIDs") are defined as "diseases of infectious origin whose incidence in humans has increased within the past two decades or threatens to increase in the near future."<sup>89</sup> This includes new diseases that have never been identified before as well as previously known diseases that have resurfaced.<sup>90</sup> Outbreaks of the HIV/AIDS virus, SARS, and most recently, the swine flu/H1N1 influenza resulted in the deaths of millions of individuals worldwide.

##### A. Recent Outbreaks

###### i. HIV/AIDS

HIV/AIDS is considered one of the most destructive pandemics in recent times, killing over twenty-five million people in the past twenty-five years.<sup>91</sup> Currently, about thirty-three million people are living with the disease around the world.<sup>92</sup> The virus attacks white blood cells, leaving the immune system significantly weakened so the body is unable to fight

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85. *Id.*

86. *Id.*

87. David P. Fidler, *Globalization, International Law, and Emerging Infectious Disease*, EMERGING INFECTIOUS DISEASES 77, 79 (1996).

88. *Id.* at 80.

89. Fidler, *Emerging Infectious Diseases*, *supra* note 30, at 778 (citing U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, ADDRESSING EMERGING INFECTIOUS DISEASE THREATS: A PREVENTION STRATEGY FOR THE UNITED STATES 1 (1994)).

90. *Id.* (citing WHO, *World Health Report 1996: Fighting Disease, Fostering Development* 15 (1996)).

91. WHO, Office of U. N. High Comm'r for Human Rights, *The Right to Health*, at 20 (June 13, 2008), available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

92. *Id.*

off infection.<sup>93</sup> HIV can be transmitted through blood, semen, vaginal fluids, or breast milk.<sup>94</sup> Transmission is possible through either intimate contact or sharing intravenous instruments.<sup>95</sup> Countries have used quarantine and restricted international travel in order to try to prevent the spread of the disease.<sup>96</sup> Since it is now known that HIV does not spread via casual contact, the use of quarantine and restriction on travel has widely been abandoned.<sup>97</sup> However, some countries still permit people infected with HIV to be isolated.<sup>98</sup>

## ii. SARS

Cases of Severe Acute Respiratory Syndrome (“SARS”) emerged in 2002 as the first new infectious disease to surface in the twenty-first century.<sup>99</sup> Symptoms of SARS typically include high fever, body aches, headache, and overall discomfort, and most patients develop pneumonia after a dry cough emerges.<sup>100</sup> SARS is thought to spread from person to person by respiratory droplets produced when an infected person coughs or sneezes.<sup>101</sup> The droplets can be propelled up to three feet onto another’s mucous membrane of the mouth, nose, or eyes.<sup>102</sup>

The mortality rate for SARS is about eleven percent.<sup>103</sup> After the first human case was confirmed in November of 2002 in southern China, the government initially tried to contain information about the outbreak.<sup>104</sup> The disease then spread to Hong Kong, Vietnam, Canada, and Singapore.<sup>105</sup> According to the WHO, 8,098 people were infected with SARS during the 2003 outbreak.<sup>106</sup> The SARS epidemic showed the world that

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93. Andreas Schloenhardt, *From Black Death to Bird Flu: Infectious Diseases and Immigration Restrictions in Asia*, 12 NEW ENG. J. INT’L & COMP. L. 263, 274–75 (2006).

94. *Id.* at 275.

95. *Id.*

96. *Id.*

97. GABLE ET AL., *supra* note 67, at 23. For example, in the Philippines, the AIDS Prevention and Control Act of 1998 § 37 explicitly prohibits using isolation or quarantine against those with HIV. *Id.* at 24.

98. *Id.* at 23.

99. Schloenhardt, *supra* note 93, at 277.

100. *Fact Sheet: Basic Information About SARS*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 3, 2005), <http://www.cdc.gov/ncidod/sars/factsheet.htm> [hereinafter CDC, *SARS Information*].

101. *Id.*

102. *Id.* It is also possible that the SARS virus is airborne spread, but this is not yet known. *Id.*

103. Schloenhardt, *supra* note 93, at 278.

104. *Id.*

105. *Id.* at 279.

106. CDC, *SARS Information*, *supra* note 100.

a highly contagious disease could spread over thousands of miles within hours.<sup>107</sup>

In the countries most severely affected by the SARS epidemic, including China, Hong Kong, Vietnam, Canada, Taiwan, and Singapore, quarantine and isolation were commonly used.<sup>108</sup> In these countries, most of the hundreds of thousands of people who were quarantined voluntarily entered into home quarantine.<sup>109</sup> For example, according to the CDC, only a small number of people in Canada required a legal order to cooperate with quarantine restrictions, and almost all of the people who were asked to follow quarantine restrictions willingly did so.<sup>110</sup> In Toronto, 0.1 percent of the individuals subject to mandatory quarantine were forced to comply due to mandatory orders.<sup>111</sup> In Asia, resistance to quarantine met extremely harsh enforcement.<sup>112</sup> For example, in China, individuals who resisted compliance with quarantine orders were threatened with imprisonment, death sentences, or being barricaded in buildings.<sup>113</sup>

Since there was limited incidence of SARS in the United States during the 2003 outbreak, the CDC in the United States did not recommend the use of quarantine,<sup>114</sup> nor did the CDC force anyone into isolation or quarantine.<sup>115</sup> However, the United States may not be so lucky the next time an epidemic breaks out. The SARS outbreak can be viewed as a wake-up call for countries to ensure proper preparation for the next crisis.<sup>116</sup> In the wake of SARS, scholars have taken into consideration whether current laws and values in the United States would support using traditional public health measures in an epidemic, including extensive quarantine measures.<sup>117</sup>

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107. Mark A Rothstein, *Are Traditional Public Health Strategies Consistent with Contemporary American Values?*, 77 TEMP. L. REV. 175, 175 (2004).

108. *Id.*

109. *Id.* at 189.

110. *Public Health Guidance for Community-Level Preparedness and Response to Severe Acute Respiratory Syndrome (SARS) Version 2*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 3, 2005), <http://www.cdc.gov/ncidod/sars/guidance/D/app2.htm>.

111. Reis, *supra* note 66, at 531.

112. *Id.*

113. *Id.* at 531–32 (citing Mike Mitka, *SARS Thrusts Quarantine into the Limelight*, 290 JAMA 1696 (2003)).

114. *Quarantine Fact Sheet*, *supra* note 25.

115. *Questions and Answers on Legal Authorities for Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 3, 2005), <http://www.cdc.gov/ncidod/sars/quarantineqa.htm>.

116. Reis, *supra* note 66, at 530.

117. See Rothstein, *supra* note 107, at 175–76.

## iii. Swine Flu/H1N1 Influenza

The swine flu, or H1N1 influenza, was first detected in the United States in April of 2009.<sup>118</sup> Symptoms typically include fever, cough, sore throat, runny nose, chills, fatigue, headache, and body aches.<sup>119</sup> The swine flu spread worldwide, and on June 11, 2009, the WHO stated that a pandemic was underway.<sup>120</sup> The pandemic alert level was raised to a Phase 6 due to the spread of the virus, not the severity of it.<sup>121</sup> On October 24, 2009, President Obama declared the swine flu epidemic a national emergency in the United States.<sup>122</sup>

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118. *Questions and Answers: 2009 H1N1 Flu ("Swine Flu") and You*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Feb. 10, 2010), <http://www.cdc.gov/h1n1flu/qa.htm>.

119. *Id.*

120. *Id.*

121. *WHO Pandemic Declaration: A Pandemic is Declared*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/h1n1flu/who/> (last visited Feb. 18, 2011). A flu pandemic occurs when a new influenza A virus emerges for which there is little or no immunity in the human population; the virus causes serious illness and spreads easily from person-to-person worldwide. *About the Flu*, FLU.GOV, <http://pandemicflu.gov/individualfamily/about/index.html> (last visited Feb. 12, 2011).

122. Press Release, President Obama, Office of the Press Sec'y, Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic (Oct. 24, 2009), available at <http://www.whitehouse.gov/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0> [hereinafter Obama Declaration of National Emergency]. The Declaration states in pertinent part:

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320b-5), do hereby find and proclaim that, given that the rapid increase in illness across the Nation may overburden health care resources and that the temporary waiver of certain standard Federal requirements may be warranted in order to enable U.S. health care facilities to implement emergency operations plans, the 2009 H1N1 influenza pandemic in the United States constitutes a national emergency. Accordingly, I hereby declare that the Secretary may exercise the authority under section 1135 of the SSA to temporarily waive or modify certain requirements of the Medicare, Medicaid, and State Children's Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule throughout the duration of the public health emergency declared in response to the 2009 H1N1 influenza pandemic. In exercising this authority, the Secretary shall provide certification and advance written notice to the Congress as required by section 1135(d) of the SSA (42 U.S.C. 1320b-5(d)).

*Id.*



By November 1, 2009, over 199 countries and territories reported confirmed cases of the H1N1 virus.<sup>123</sup> During this time period, the United States experienced intense and ongoing transmission of the illness, which “continue[d] . . . without evidence of peak in activity.”<sup>124</sup> In Europe and Asia, the transmission continued to increase across borders.<sup>125</sup> The WHO actively monitored the spread of the disease.<sup>126</sup> China employed quarantine methods in attempt to stop the spread of the H1N1 virus.<sup>127</sup> However, some believed that this response was disproportionate to the threat.<sup>128</sup> Since Chinese authorities are still criticized for not responding promptly enough during the outbreak of SARS in 2003, the authorities knew the importance of monitoring and accordingly responded powerfully to the swine flu outbreak through quarantining.<sup>129</sup> China’s response illustrated a clear difference in response tactics between China and the United States.<sup>130</sup>

In the United States, factors such as “rugged individualism, self-reliance, nonconformity, and independence are highly valued.”<sup>131</sup> Since this is what American society is based upon, it does not seem as though such arbitrary isolation and quarantine measures similar to those taken in China would be as likely to occur in the United States. This is why a uniform set of minimum standards that clearly illustrates when a Member State may act in a way that violates the human right to movement is necessary. The WHO should use the TRIPS agreement as a guide to create this international standard, as the TRIPS agreement contains many of the same types of provisions that a successful international health agreement would require.

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123. *Global Alert and Response (GAR): Pandemic (H1N1) 2009—Update 73*, WORLD HEALTH ORG., [http://www.who.int/csr/don/2009\\_11\\_06/en/index.html](http://www.who.int/csr/don/2009_11_06/en/index.html).

124. *Id.*

125. *Id.*

126. *Id.*

127. McNeil & Lafraniere, *supra* note 3.

128. *Id.*; see also Bill Meyer, *Swine Flu Quarantine: The Chinese Biohazard Suits Mean You Won't Make it to the Wedding*, CLEVELAND.COM (May 18, 2009), [http://www.cleveland.com/world/index.ssf/2009/05/the\\_chinese\\_biohazard\\_suits\\_me.html](http://www.cleveland.com/world/index.ssf/2009/05/the_chinese_biohazard_suits_me.html) (American tourists were forced into quarantine in a Chinese hotel room for seven days simply because their plane had a two-hour layover in Cancun, Mexico. They never showed any symptoms.).

129. McNeil & Lafraniere, *supra* note 3.

130. Rothstein, *supra* note 107, at 182.

131. *Id.* at 190.

V. THE TRIPS AGREEMENT: A POSSIBLE GUIDE FOR CREATING A  
MULTILATERAL INTERNATIONAL HEALTH REGULATION AGREEMENT

The TRIPS agreement is a multilateral agreement that protects international intellectual property rights.<sup>132</sup> It has been called “the most ambitious international intellectual property convention ever attempted.”<sup>133</sup> The TRIPS agreement does not require that all countries have identical rules on protection of intellectual property.<sup>134</sup> Members are simply required to comply with certain minimum standards, and they may implement in their law more extensive protection if so desired, as long as these protections do not contravene the agreement.<sup>135</sup> This creates a uniform minimum level of protection for intellectual property rights. It recognizes that there are different ways to protect intellectual property rights, but establishes a mandatory minimum level of protection that WTO members are obligated to provide.<sup>136</sup>

The TRIPS agreement also contains a national treatment standard, mandating that a Member State must accord the same protection to foreigners as accorded to its own nationals.<sup>137</sup> This encourages a system of non-discrimination because a WTO Member may not treat other WTO Members less favorably than it treats its own nationals with regard to intellectual property protection.<sup>138</sup> TRIPS also contains a most-favored-nation treatment standard.<sup>139</sup> This means that Member States are required to give equal treatment to nationals of all trading partners in the WTO, and one partner may not be treated more “favorably” than another.<sup>140</sup>

TRIPS Part III, the enforcement section, details the procedures and remedies that are available to rights holders in the event of violation.<sup>141</sup> The enforcement provisions are divided into five sections, including a “General Obligations” section, a section regarding civil and administrative procedures and remedies, a section on border measures, and a sec-

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132. *TRIPS Overview*, *supra* note 27.

133. Rosielyn Alviar Pulmano, *In Search of Compliance with TRIPS Against Counterfeiting in the Philippines: When is Enough Enough?*, 12 *TRANSNAT'L LAW* 241, 262 (1999).

134. *Frequently Asked Questions about TRIPS in the WTO*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm) (last visited Feb. 18, 2011) [hereinafter *TRIPS FAQ*].

135. *Id.*

136. Darya Haag, *Time to Pay the Dues or Can Intellectual Property Rights Feel Safe with the WTO?*, 8 *RICH. J. GLOBAL L. & BUS.* 427, 436 (2009).

137. Pulmano, *supra* note 133, at 263.

138. Haag, *supra* note 136, at 437.

139. Pulmano, *supra* note 133, at 263.

140. *Id.* at 264.

141. *TRIPS FAQ*, *supra* note 134.

tion on criminal procedures.<sup>142</sup> Article 41.1 states that "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement."<sup>143</sup> Enforcement procedures must be "fair and equitable" and may not be "unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."<sup>144</sup>

In order to enforce requirements under TRIPS, the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") enables parties to bring a claim against another party in front of a "single unified nucleus" called the Dispute Settlement Body ("DSB").<sup>145</sup> The DSU describes a structured procedure for dispute resolution under the WTO.<sup>146</sup> After the DSB makes a decision and issues recommendations for action on the part of the parties, the DSU continues to observe the losing party's steps to ensure compliance with the recommendations.<sup>147</sup>

It is evident that the drafters of the TRIPS agreement recognized the inherent difficulties faced by certain countries in implementing all of the TRIPS requirements. Therefore, TRIPS allows developing countries a longer transition period for bringing their legislation and practices into conformity with the TRIPS requirements than for developed countries.<sup>148</sup> Thus, all Members have time to ensure that they are complying with TRIPS before they can be brought to the DSB for failure to comply. These TRIPS concepts, while only relating to international intellectual property protection, may be analogized into the world of international health regulation in order to help prevent the spread of disease while limiting the amount of arbitrary and discriminatory violations on the right to movement.

## VI. A PROPOSED MULTILATERAL HEALTH AGREEMENT

In order to eradicate epidemics and other diseases while respecting individuals' basic human rights, complete cooperation with the proposed multilateral health agreement is vital. The WHO Constitution grants the

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142. See Agreement on Trade-Related Aspects of Intellectual Property Rights Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

143. *Id.* art. 41.

144. *Id.* art. 41(2).

145. Haag, *supra* note 136, at 433.

146. *Id.* at 432.

147. *Id.* at 434.

148. TRIPS Agreement, *supra* note 142, art. 65.

WHO power to create quarantine requirements,<sup>149</sup> and Article 3 of the 2005 IHR states that its regulations must be read in compliance with human rights.<sup>150</sup> Thus, the WHO has the power to introduce mandatory requirements in relation to quarantine measures, though these requirements must comply with fundamental human rights. The WHO should exercise this power and not only ensure compliance with human rights but also help prevent countries from unfairly denying individuals their human rights. The WHO should implement specific and exact circumstances under which a Member State may infringe upon human rights by using a method such as quarantine. The WHO should implement an agreement, similar to the TRIPS agreement, including provisions that specifically describe types of minimum standards that all countries must follow when implementing quarantine measures. This proposed agreement should also have enforcement provisions similar to the provisions in TRIPS, and the WHO should create its own version of the WTO's DSU where cases of agreement violations could be heard. Additionally, there should be a monitoring system to ensure that the recommendations made are complied with, and if not complied with, then alternate remedies could be made available. The WHO should be more aggressive and use its authority to the full extent. What purpose does an organization such as the WHO have if it does not utilize its power?

The global society should be thought of as one entity, especially in the context of public health. In the United States, there are procedural and substantive due process requirements with regard to quarantine.<sup>151</sup> If a government action impedes on a fundamental right, the courts apply strict scrutiny, and the action will be upheld only if it is "necessary to promote a compelling or overriding governmental interest."<sup>152</sup> However, in China, perhaps due to the SARS outbreak in 2003, the country was quick to act with their quarantine measures. Thousands of Americans were quarantined in the spring and summer of 2009 in China, and many American citizens feared travel to this part of the world.<sup>153</sup> In the United

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149. WHO Constitution, *supra* note 35, art. 21(a).

150. WHO, *IHR 2005*, *supra* note 72, art. 3.

151. See generally Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299 (2007).

152. *Id.* at 1314.

153. See Martia Cook, *China Journal: My 4 Days in Quarantine*, CBS NEWS (June 30, 2009, 10:32 AM), <http://www.cbsnews.com/blogs/2009/06/30/worldwatch/entry5125362.shtml> ("And ultimately, the most frustrating feeling is the awareness that I should NOT be here. I AM PERFECTLY WELL! There's nothing wrong with me. I feel fine. Yet, I'm being treated as an ill patient!").

States, federal law gives the President the power to declare a national emergency,<sup>154</sup> a power that expands the government's power and ability to impose restrictions on human rights. However, it is worth emphasizing that a situation calling for restrictions on human rights must be declared an emergency. The United States declared the swine flu/H1N1 outbreak a national emergency over a year after the first sign of the disease,<sup>155</sup> and only then could measures such as quarantine be used. China, on the other hand, reacted quickly, and countless healthy travelers were subjected to quarantine measures.

The great discrepancy in response time between China and the United States is evidence that more stringent and specific requirements are needed to streamline exactly when governments should be able to impose measures on individuals that violate their human rights. In certain situations, quarantine measures may in fact help prevent the spread of disease.<sup>156</sup> Therefore, in order to strike a balance between preventing the spread of disease on both the national and international level, and protecting human rights, there must be a unified set of minimum standards that all countries must follow to justify an infringement on human rights.

The minimum standards in this proposed agreement must be extremely specific, so that a Member State knows exactly when it is able to take actions that infringe upon individuals' freedom of movement. A surveillance system in each Member State is essential to creating a feasible agreement. Surveillance is "the systematic collection, analysis, interpretation, and dissemination of selected health information."<sup>157</sup> Surveillance is necessary in order to monitor disease outbreaks. Since the 2005 IHR enhances surveillance and notification system requirements, the WHO is already capable of collecting the necessary data to determine when the infringement on the right to movement is warranted.<sup>158</sup> However, with surveillance, especially mandatory testing and screening, comes issues of consent and privacy.<sup>159</sup> While this may be the case, mandatory testing and screening may be a beneficial tradeoff because if Member States have accurate data, they are less likely to take unnecessary or arbitrary responses. Under the proposed agreement, all measures taken in response to a threat would be absolutely necessary to prevent the spread of the disease.

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154. See 50 U.S.C. § 1621; see also HAROLD C. RELYEA, CONG. RESEARCH SERV., NATIONAL EMERGENCY POWERS (2007).

155. Obama Declaration of National Emergency, *supra* note 122.

156. *Quarantine Fact Sheet*, *supra* note 25.

157. GABLE ET AL., *supra* note 67, at 3.

158. *IHR Brief No. 2*, *supra* note 44.

159. GABLE ET AL., *supra* note 67, at 3–4.

Once a Member State has all of the data necessary, the Member must turn to the minimum standards provisions of the proposed agreement to ensure that the situation is a serious enough emergency that warrants limiting the right to movement. Vague phrases that have been used in the past, such as “an imminent public health risk,”<sup>160</sup> must be given clear and precise definitions, as agreed upon by a panel of medical experts. One key factor to be considered in determining the level of emergency is the percentage of the population already infected and in how long a period of time. This will give the Member State an accurate and realistic view on the severity of the disease and its contagious nature. Only once the severity and contagious nature of a disease reach a certain level, which will be determined by medical experts prior to the implementation of this proposed agreement, may a Member use a method that impinges on the right to movement. Therefore, if this proposed agreement was in force during 2009 when the Chinese government was quarantining thousands of foreigners in fear of the swine flu, then China would be deemed to have violated the agreement if the severity did not meet the criteria necessary to use such measures.

Additionally, the proposed agreement would include a provision that resembles the national treatment provision in TRIPS.<sup>161</sup> This would help prevent the possibility of a country imposing irrational and discriminatory quarantine measures against citizens of another country in fear that they are more likely to be carrying the disease. Upon learning that the first carrier of the swine flu was from Mexico, the Chinese government imposed far more disturbing measures against Mexican foreigners in China than any other known foreigner or national.<sup>162</sup> This is not to say that the proposed provision would absolutely bar a Member State from using these measures if they were reasonable and justifiable. However, this flexibility would be clearly stated and described in the agreement. Additionally, the fact that Members could bring other Members to a dispute settlement board for violating the agreement would deter Members from targeting certain foreigners without reason in fear of the repercussions.

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160. WHO, *IHR 2005*, *supra* note 72, art. 31.

161. See TRIPS Agreement, *supra* note 142, art. 3 (“Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . .”).

162. See, e.g., Andrew Browne, *China Forces Dozens of Mexican Travelers Into Quarantine*, WALL ST. J., May 4, 2009 (“The A/H1N1 flu outbreak is leading to a potential diplomatic row between China and Mexico, as Chinese health authorities round up and quarantine scores of Mexicans—only one of whom is thus far reported to be sick—as they fly in on business and holiday trips.”).

While implementing a set of minimum standards may be difficult on Member States due to the fact that the efficiency of a country's national health system is dependent on many factors, including political, social, and economic positions,<sup>163</sup> the only actual requirement is the implementation of surveillance systems adequate enough to determine an accurate count of cases of a disease. Further, the proposed agreement will contain a provision similar to TRIPS Article 67, which encourages developed countries to assist developing and least-developed countries to comply by providing technical and financial aid.<sup>164</sup> Developed members will be encouraged to assist developed and least-developed countries in order to get their surveillance systems in proper, working order. Also, as TRIPS has transition period provisions,<sup>165</sup> the proposed agreement will also have a transition period to give Members the time needed to make the necessary changes to their national surveillance systems.

If individuals are assured that extreme measures will not be arbitrary and will only be used when completely necessary for the overall public good, then there will likely be less resistance when measures must be taken. Building trust between a government and its residents and visitors is essential to harmonize the protection of the concurrent rights to health and movement. Trust can be established by implementing a set of minimum standards that all Members must follow to prevent arbitrary infringement of human rights. Further, the enforcement mechanism would ensure that if these standards were to be violated, there would be repercussions.<sup>166</sup>

#### CONCLUSION

There is friction between the right to health and the right to movement because in order to prevent the spread of infectious disease, it is often necessary to quarantine those who are ill or who have been exposed to the illness. In furtherance of balancing the right to movement with dis-

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163. See BEIGBEDER, *supra* note 7.

164. TRIPS Agreement, *supra* note 142, art. 67 ("In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members.").

165. *Id.* art. 65.

166. This proposed agreement, as is, would be implemented by the WHO. However, in order for this agreement to work, there must be mechanisms to back it up, such as the dispute settlement body, as described above, which would take time and money to develop. An alternative proposal, beyond the scope of this Note, is to incorporate this health issue into the WTO, which already has many of the mechanisms necessary in order for this agreement to be successful.

ease prevention, the WHO should implement a multilateral agreement containing sections that resemble certain provisions of the TRIPS agreement. The proposed agreement should specifically state the level of emergency, as determined by a panel of medical experts, at which a Member State may use measures that infringe upon human rights, specifically the right to movement, in order to prevent the spread of a disease. The level of emergency during which it would be acceptable to use methods that infringe the right to movement through quarantine methods must be equivalent throughout all Member States so that certain countries do not deny human rights more arbitrarily than others. While it may take time to implement such an agreement, and while it may be difficult, this agreement is necessary in order to strike a balance between the right to movement and disease prevention. It will also create trust in the government if individuals know that their human rights may only be infringed upon when necessary for the public good.

The right to health and the right to movement are basic fundamental rights that every person in this world should be afforded with as little governmental restriction as possible. However, when government regulation is necessary for the greater public good, some basic rights may be sacrificed but only in a way that is unified throughout the world as governed by the WHO. This unified system would not allow human rights to be infringed until a certain level of emergency is reached, and if this proposed agreement had been in effect before the most recent swine flu outbreak, it is likely that significantly fewer people would have been forced into unnecessary quarantine throughout the world. This framework, if adopted, will help minimize the unnecessary and arbitrary infringement of human rights going forward.

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